United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Brief for Appellee

74-1118

To be argued by
JOAN S. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1118

UNITED STATES OF AMERICA,

Appellee,

—*against*—

HAROLD SANCHEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Harold Sanchez appeals from a judgment of conviction entered on December 14, 1973, after trial by jury in the United States District Court for the Eastern District of New York (Neaher, *J.*), which judgment convicted him of rape within the territorial jurisdiction of the United States under Title 18, United States Code, Section 2031, assault with the intent to commit rape under Title 18, United States Code, Section 113 and theft under Title 18, United States Code, Sections 2111 and 660. The appellant was sentenced to an indeterminate period for study and observation under Title 18, United States Code, Section 4208(b).

On this appeal, the sole issue concerns the District Court's refusal to grant three defense requests to charge which particularized appellant's defense. That defense, which was based on the testimony of an F.B.I. serologist, Thomas Kelleher, concerned an inconclusive blood grouping test made, apparently, of the rapist's semen left on the bedcovers. Appellant does not challenge the sufficiency of the evidence.

Statement of Facts

A. The Government's Case

On March 28, 1972 Mrs. Linda Jeanne Wilson was living with her husband, a United States Army recruiter, in an apartment on the base at Fort Hamilton, Brooklyn, New York (202-203).* At approximately 2:45 P.M., while Mrs. Wilson was alone, a stranger came to her door and informed her that he had to check the serial numbers on her refrigerator because the Army was preparing to replace them (204).** Mrs. Wilson allowed him into the apartment and accompanied him to the kitchen where he removed the bottom plate of the refrigerator and discovered the serial numbers which he wrote down (205, 207). She described him as a black male between the ages of 25 to 30, six feet tall, at least 160 pounds, an Afro haircut with an unusual part, moustached and with acne pit marks on his face (208). She observed him carrying a cane as he entered her apartment and noticed a brace on his right leg as he bent to ascertain the serial number (206-207).

After he wrote down the serial number, Mrs. Wilson asked him if he was from "Family Warehouse", the department for dispatching government furniture. She informed him that she had called the Family Warehouse on prior occasions to arrange for them to remove some furniture that they had lent to her (209). The man asked to see the furniture and its "paperwork", the requisition forms (210). When Mrs. Wilson was unable to locate the forms, the stranger asked her if her husband would know where they

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* Numbers in parentheses refer to the pages of the trial transcript.

** The parties stipulated that Mr. and Mrs. Wilson's apartment was located within the exclusive territorial jurisdiction of the United States (625).

were. She responded that he would not be home until 6 P.M. (211). At this point the man went into her bedroom and viewed a disassembled bed, part of the furniture that was to be returned (212). He agreed to return the bedrails if she could provide him with string (213). At this point, Mrs. Wilson lifted up one of the side bedrails and handed it to the man (213-214). Mrs. Wilson then left, returned with the string and gave it to the man. As Mrs. Wilson was turned, the man grabbed her told her not to scream, put his hand over her mouth and placed a steak knife to her throat (214-215). He reached into the clothes basket and removed a pillow case with which he gagged Mrs. Wilson. He then tied her hands behind her back with the string she had given him and smacked her in the face, telling her not to scream (215). He removed her clothing from the waist down, placed her on the bed, placed a white piece of cloth over her face and then raped her with the steak knife at her throat (216-217). Afterwards he tied her legs and left her in the bedroom. He returned shortly thereafter to ask her if she had any watches or cameras. When she informed him that she had a camera, he picked up a 35 mm. camera from her dresser (219). At this time she observed him wiping the doorknob and the edge of her own bed with a dishtowel (220-221). She heard him in the other rooms for a few minutes thereafter. When the noises stopped, she managed to untie her hands and feet and ventured into the living room (222). She noticed that her portable color television and money from her purse were missing (225).

Some fifteen months later, in June of 1973, Mrs. Wilson was shown a photographic spread of six photos by F.B.I. agents. She identified a photograph of appellant Harold Sanchez as her assailant (231). A lineup was conducted on June 14, 1973. Out of six individuals in the lineup, Mrs. Wilson identified appellant (233). At trial on September

19, 1973, Mrs. Wilson again identified appellant as her assailant (234).*

On the date of the assault at approximately 3:10 P.M., another witness, Wendy Walker, age 13 (342), was returning from school to her apartment which was in the same building as that of the Wilsons. While waiting at the street level for the elevator, she saw a man exit the elevator and proceed out of the building. She observed that he had an Afro with an unusual part, a cane in one hand, a television set in the other and a glint of metal at his feet (313, 315). On September 14, 1973, three days before the trial herein, Miss Walker identified the defendant Harold Sanchez as being the man "most familiar to what [she] remembered" exiting the elevator (316). At a lineup conducted the same day, which included appellant, Miss Walker stated that she was not sure it was anyone in the lineup, but selected another individual as most resembling the man at the elevator (340). Nevertheless, she testified at the trial that at the lineup, appellant had a full beard that made his face look fuller which is why she discounted him (342). She did assert, however, that she did have a mental picture of the man at the elevator and there was no doubt in her mind that the appellant was the same man (350).

At trial, F.B.I. fingerprint expert Douglass O. Cole testified that a latent fingerprint lift removed from the finished side of one of the disassembled bedrails in Mrs. Wilson's bedroom was made by the appellant Harold Sanchez (401).

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* Several days after the assault, Mrs. Wilson was shown over two hundred photographs at the New York City Police Department Bureau of Criminal Identification. Mrs. Wilson was asked to indicate to the authorities the various characteristics of her assailant by selecting similar identifying characteristics from the individuals in these photographs. Mrs. Wilson never identified any photograph as her assailant, but did select a photograph of one Joseph Richardson as a man who "vaguely resembled" the rapist (250-252, 301-302, 387-388).

Medical records introduced at trial indicated that appellant Harold Sanchez had a brace as of March 2, 1973 and was being treated at the Veterans Hospital at Fort Hamilton, Brookyn, New York (424). The records also indicated that appellant did not appear for his previously scheduled appointment on March 30, 1972, two days after the rape (613).

B. The Defense Case

At trial, Sanchez testified that he was in the United States Army and stationed at Fort Hamilton from November, 1969 until April of 1971. He had an apartment at that time in the same building as Mrs. Wilson's apartment in a floor above. He had received furniture from Family Warehouse, had visited friends who had apartments on various floors in his building and in January or February, 1970, he was assigned to move furniture from Family Warehouse (438-443).* Sanchez admitted that he received a brace for his right leg in December of 1971, that he needed the help of a cane, and that in March, 1972, he had received medical attention from the clinic at the Veterans Administration Hospital at Fort Hamilton (451-545). The appellant denied, however, that he had raped Mrs. Wilson (473).

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* The defense, in summation, argued that appellant's fingerprint was placed on the bedrailing at the time he was stationed at Fort Hamilton and remained there several years (573). Mrs. Wilson had testified in rebuttal however that when she had received this bed from Family Warehouse, it was so very dusty and dirty that she and her husband cleaned it first with a broom, then a rag. Although it might have been possible that she missed a spot, she did remember cleaning the outer portion of the bed railings and cleaned very thoroughly (528-531). The F.B.I. fingerprint expert also testified that although some fingerprints can last for a number of years if the moisture in the finger is absorbed by an absorbent surface, a print on a hardwood surface is fragile and will last only until the moisture forming the print is evaporated into the air (412).

At trial, the defense also called as its witness Thomas Kelleher, a forensic serologist of the Federal Bureau of Investigation. Kelleher explained that there are four human blood types: A, B, AB and O. He explained:

> Now, if a person belongs to blood group A, then he has present in his red blood cells and in his blood supply the blood group substance A, but does not have present the blood group substance B, and therefore he is in blood group A.
>
> If a person has the B blood group substance present, in his red blood cells and not the A blood group substance, then he belongs to blood group B.
>
> If both are present, he belongs to blood group AB.
>
> If neither are present, he belongs to blood group O (432).

Thus, the test for blood type grouping is effective only to prove the existence of either A or B factors or both. If, in a blood sample, neither A nor B factors are present, then this blood is grouped as type O (zero factors). In addition, blood type can be ascertained not only from blood samples but, in some instances, from the secretions of other bodily fluids. Thus, 85 percent of the population are "secreters" and their blood type will show up in their saliva, semen, vaginal fluid, et cetera (432). Thus, in such a secretion the presence of an A factor indicates that the donor was a secreter and of the A blood grouping. The non-existence of either an A or B factor indicates either that the individual is a non-secreter, or that he is a secreter and a member of the O blood group. In rape cases where vaginal secretions are often combined with the semen, and an A blood factor is present, there is no possible way to identify the donor of the A factor. Thus, either the rapist contributed the A

factor (if a secreter), or the victim contributed the A factor (if a secreter) and the other party was type O or a non-secreter, or they both are type A secreters. There is no scientific way to segregate the female from the male portion of the stain.

Kelleher received Mrs. Wilson's bedspread a week after the incident. Two stains on it contained semen and the presence of blood type A (Mrs. Wilson's blood type and not appellant's, which is O). Kelleher, however, was unable to state that the blood type was a product of the semen as opposed to Mrs. Wilson's vaginal fluid, since in such a stain there are frequently present both semen and vaginal secretions (430-435).

ARGUMENT

The District Court properly refused to incorporate appellant's requests to charge in its instructions to the jury.

The appellant argues that the conviction should be reversed because the Court failed to charge on a "theory of the defense" thereby denying him a fair trial.

The defense requested the following charges:

> 1. If you find from the evidence that there existed a seminal stain which was not commingled or mixed with Linda Wilson's body fluid, and which was tested for blood group, you must find the defendant not guilty.
>
> 2. If you find from the evidence that a blood grouping test was performed on a seminal stain produced by the rapist, which stain was unaffected by the complainant's body fluid, you must find the defendant not guilty.

> 3. If you find from the evidence that a blood grouping test was performed on a pure seminal stain produced by the rapist, you must find the defendant not guilty (Appellant's Appendix, A-15).

The government requested that Kelleher's entire testimony be stricken because his findings were totally inconclusive as to Sanchez' innocence or guilt (553-554). The Court denied the government's motion to strike, but also denied the appellant's request to charge in the manner offered (558). Instead, Judge Neaher charged:

> A Government witness was produced here, Mr. Kelleher, the serologist . . . who gave certain evidence based on—I believe he called them seminal stains, or body fluid stains found in a certain bed cover which had been removed from the bed where the act described by Mrs. Wilson took place.
>
> All this is grist for you to decide to weigh and evaluate and form, as I say, the ultimate determination you have to make with respect to the guilt or innocence of this particular defendant on trial (638).*

On appeal, appellant contends that the District Court's charge was insufficient to give the jury his theory of defense.

There is no doubt but that it is reversible error for a Court to refuse to instruct on a theory of defense if a charge is requested and properly worded. *United States* v. *Blane,* 375 F.2d 249, 252 (6th Cir. 1967); *Gay* v. *United States,* 408 F.2d 923, 927 (8th Cir.), *cert. denied,* 396 U.S. 823 (1969); *United States* v. *Indian Trailer Corporation,* 226 F.2d 595, 598 (7th Cir. 1955); *Levine* v. *United States,* 261 F.2d 747, 748 (D.C. Cir. 1958); *Strauss* v. *United States,* 376 F.2d 416 (5th Cir.

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* It should also be noted that in summation, defense counsel extensively commented on Kelleher's testimony in a light favorable to the defendant (573-575).

1967); *Salley* v. *United States*, 353 F.2d 897 (D.C. Cir. 1965). It is also evident that there must be some foundation in the evidence adduced at trial relevant to the specific defense being requested, even if this evidence is weak, insufficient, inconsistent or of doubtful credibility. *Gay* v. *United States, supra; Strauss* v. *United States, supra.* When special facts present an evidentiary theory which if believed would tend to defeat the factual theory of the prosecution's case, specific instructions indicating the factual theory of the defense must also be given. *Levine* v. *United States, supra; Salley* v. *United States, supra.* In this case, however, there was no evidence whatsoever that would even tend to prove that Sanchez was not the rapist who deposited semen on the bedspread.

As was argued in the District Court (553-554), while it might be possible that the sample stain contained only the male secretions of an A blood type donor, it is equally as logical for the jury to conclude that the A blood factor belonged to Mrs. Wilson (who was an A blood type) and the rapist was a member of the O blood type (as was appellant). The serologist's testimony was also inconclusive because there was no evidence that Sanchez belonged to the 85% of the population who secrete their blood type in semen. Furthermore, there was no foundation given which would tend to prove that the dry stain was that of the assailant at all. Because there was no foundation and more importantly, because the witness, Kelleher, was unable to segregate the male from the female portions of the stain, the jury should not have been allowed to engage in mere guesswork as to whom the A factor belonged. Kelleher's expert "opinion" was probative of nothing (1 Wigmore on Evidence (3rd Ed.), § 32 at pp. 419-421). There was, therefore, no foundation in the evidence which would warrant the jury to conclude that the assailant deposited the A factor discovered in the stain. The Court properly denied the appellant's request to charge.

It should be noted, however, that the Court clearly highlighted in its charge appellant's main theory of defense, mistaken identification. The Court charged that the "essential issue is the issue of the identity of the person who perpetr ted that act" (630). It further instructed that since the "charge of rape . . . is easily made, and once made, difficult to disprove," the jury should "examine the testimony of the prosecuting witness with caution" (626-627). Judge Neaher also referred to the evidence of photographic identification and cautioned that although the use of photographic spreads are widely used in law enforcement, "mistaken photographic identification can occur . . . [E]ven when investigating officers follow the most correct photographic identification procedures, there is some danger that a witness may make an incorrect identification" (633). The Court also referred to the testimony of the fingerprint expert in a light favorable to appellant stating that although the expert testified that in his opinion, the lift was an "identical comparison" to Sanchez' print, the expert "made no statement it was a positive identification" (632). The Court also commented upon Sanchez' main theory of defense, that his fingerprint might have lasted on the bed railings from his prior residency at Fort Hamilton:

> "Now, the defendant, in taking the stand, denied that he was present at the time or place in question. He gave other evidence relating to his past connection with this particular apartment dwelling, having —I believe he said, been a resident there himself. He gave testimony to the effect that he visited this particular place within a few weeks certainly, and several times after that for treatmer[illegible]" (638).

The Court followed this instruction with the instruction on the serologist's testimony quoted previously. In all, the Court in its charge not only stressed the fact that the sole contested issue was one of identity, but also commented on the government's evidence of identity in a light favorable

to the defense and mentioned appellant's own testimony as to his residence. In short, the Court's instructions adequately apprised the jury of the main issue in the case and appellant's theory of misidentification.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

March 27, 1974

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Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 28th day of March 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a two copies of Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Stanley Zinner, Esq.
507 East 161st Street
Bronx, New York

Sworn to before me this
28th day of March 1974

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355